



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FACSIMILE AND FIRST CLASS MAIL
202-225-5444

Igor A. Birman, Esq.
Chief of Staff
Rep. Tom McClintock (CA-4)
508 Cannon House Office Building
Washington, DC 20515

JUL 23 2009

RE: MUR 6125
McClintock for Congress

Dear Mr. Birman:

On November 7, 2008, the Federal Election Commission ("Commission") notified your clients, Representative Tom McClintock and McClintock for Congress and David Bauer, in his official capacity as treasurer, (collectively the "Respondents"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on July 14, 2009, voted to dismiss this matter and accordingly, closed its file in this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Based on the information before the Commission, it appears that some of the Respondents' telephone bank calls disseminated on or about October 22, 2008, may have been transmitted without a disclaimer stating who paid for the communication. Specifically, when a political committee "makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising," it must place a disclaimer in the communication identifying the authorized political committee that paid for the communication. See 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11. The Commission cautions the Respondents to ensure compliance with 2 U.S.C. § 441d and 11 C.F.R. § 110.11 in the future.


Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

29044251048

Igor A. Birman, Esq.
MUR 6125
Page 2 of 2

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a stylized flourish at the end.

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

29044251049

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT: McClintock for Congress MUR: 6125**
4 **and David Bauer, in his**
5 **official capacity as treasurer**
6 **Representative Tom McClintock**
7

8 **I. INTRODUCTION**

9 This matter was generated by a complaint filed with the Federal Election Commission by
10 Todd Stenhouse, *see* 2 U.S.C. § 437g(a)(1), alleging that Tom McClintock and his principal
11 campaign committee, McClintock for Congress and David Bauer, in his official capacity as
12 treasurer ("Committee"), placed automated calls to voters that advocated McClintock's election,
13 advocated the defeat of his opponent, Charlie Brown, and failed to include a disclaimer. In its
14 response, the Committee admits to having placed automated calls to voters in California's 4th
15 Congressional District advocating the election of McClintock, but denies that the calls advocated
16 the defeat of Brown or that the calls omitted a disclaimer. Complainant submitted recordings of
17 three of these calls revealing that the candidate identifies himself at the start of a recorded
18 message, but the message does not state who paid for the communication. However, along with
19 its response to the complaint, the Committee submitted a recording of the call at issue that does
20 include a disclaimer at the end of the call that states "[t]his message is paid for by McClintock
21 for Congress."

22 As discussed in further detail below, based on the circumstances surrounding the alleged
23 violation of the disclaimer provisions of the Federal Election Campaign Act of 1971, as amended
24 ("the Act") and the Commission's regulations, the Commission dismisses the allegations against
25 Representative Tom McClintock and McClintock for Congress and David Bauer, in his official
26 capacity as treasurer, as a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S.

29044251050

821 (1985). The respondents are cautioned to ensure compliance with 2 U.S.C. § 441d and 11 C.F.R. § 110.11 in the future.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

Tom McClintock was the Republican candidate for California's 4th Congressional District during the 2008 election cycle. McClintock's campaign committee placed automated calls to voters in the 4th District in October 2008 advocating his election. See Complaint; Committee Response at ¶ 1. According to the complaint, however, those calls failed to include the proper disclaimer pursuant to the Commission's regulations at 11 C.F.R. § 110.11. Complaint at 4-5. In support of the allegation, the complaint included recordings of three phone messages containing the Committee's automated message. *Id.* at Exhibit A. The recordings contain the following message:

Hi, this is Tom McClintock. The federal government already spent hundreds of billions of dollars on bailouts. Now Nancy Pelosi and her friends want to spend over 3 trillion dollars on new programs and Charlie Brown's right there with her committed to every dime of it. You and I can't afford that. Worse, our children and grandchildren don't deserve the bill either. You knew me for years. I have battled for fiscal sanity in California. I'll wage the same fight in Washington.

The complaint details the receipt of three phone messages containing the Committee's automated message transcribed above by three separate individuals on October 22, 2008. Complaint at 2-4. One such call was received at the campaign offices for candidate Charlie Brown and was heard by the campaign manager/complainant. The complaint also alleges that the same automated call was received by individuals named Hank Raymond and Alan Shuttleworth. Each of these automated calls was recorded by the recipients' answering

29044251051

1 machines, and the recordings appear to be complete copies of the messages that were received.
2 For instance, one of the complainant's recordings starts and ends with the following system
3 messages: "First saved message sent Wednesday, October 22, at 5:59 p.m." and "End of
4 Message," respectively. Further, the complainant attests that the recordings provided with the
5 complaint were "a full and complete copy of the automated call[s]" that were received.
6 Complaint at 2-3.

7 The Committee also submitted a recording of the call at issue along with its response to
8 the complaint. Committee Response at Exhibit A. That recording is otherwise identical to those
9 submitted by the complainant, but ends with the statement "[t]his message is paid for by
10 McClintock for Congress."¹

11 Prior to making a recommendation in this matter, the Office of General Counsel sought to
12 reconcile the discrepancies between the respective recordings submitted by the parties and sent a
13 letter inviting counsel for the Committee to "provide any information you may have regarding
14 the discrepancy between the audio recordings provided by Complainant, which have no audible
15 disclaimer, and the recordings you submitted." In response, Representative McClintock
16 submitted a sworn affidavit acknowledging he recorded the automated call at issue. In addition,
17 he explains that during the course of his campaign, he recorded a separate disclaimer and that the
18 Committee's vendor, Dane & Associates, was instructed to disseminate the automated call with
19 his recorded disclaimer. Dane & Associates reportedly provided a recording to the Committee
20 containing the final version of the automated call, which contained the disclaimer. The

¹ It appears that McClintock's campaign provided the same recording to the news media shortly after the complaint was filed in this matter. See Ben van der Meer, *Brown Campaign files FEC Complaint over McClintock robocall disclaimers*, Oct. 30, 2008, <http://www.politicker.com/california/4079/brown-campaign-files-fec-complaint-over-mcclintock-robocall-disclaimers> (last accessed 4/15/2009).

respondents submitted a copy of that recording to the Commission as part of their response to the complaint.

B. Analysis

The complaint raises the question whether the Committee's automated calls contained the appropriate disclaimer, as required by the Act and the Commission's regulations. The Act requires that when a political committee "makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising," they must place a disclaimer in the communication identifying the authorized political committee that paid for the communication. 2 U.S.C. § 441d(a)(1). Such disclaimers must be presented in a "clear and conspicuous manner" in order to give the listener "adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication." 11 C.F.R. § 110.11(c)(1).

The Commission's regulations further specify that disclaimers are required in "[a]ll public communications, as defined in 11 C.F.R. § 100.26, made by a political committee." 11 C.F.R. § 110.11(a)(1). A "public communication" is defined in the Act and the Commission's regulations as a "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." See 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A "telephone bank to the general public" means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. Telephone calls are substantially similar when they "include substantially the same template or language, but vary in non-material respects such as

29044251053

1 communications customized by the recipient's name, occupation, or geographic location."

2 11 C.F.R. § 100.28. Assuming that the calls at issue in this matter were a "public
3 communication," a disclaimer stating who paid for the calls was required by the Act and
4 Commission regulations.

5 Included with the complaint in this matter were recordings of three calls which may have
6 been transmitted without a sufficient disclaimer. However, the recorded message provided with
7 the Committee's response to the complaint discloses who paid for the communication at the end
8 of the message by stating that "[t]his message is paid for by McClintock for Congress." See
9 Respondent's Exhibit A. In addition, the Committee and the candidate assert that they
10 understood that this was the version of the recording (containing the disclaimer) that their vendor
11 was to disseminate to voters.

12 It is possible that an error was committed by the vendor during transmission of the calls.
13 In recent cases involving possible vendor error, the Commission has declined to pursue the
14 alleged violations. For instance, in MUR 5991 (U.S. Term Limits), the Commission dismissed
15 the disclaimer allegations because of confirmed vendor error. See Certification dated March 6,
16 2009 and Factual and Legal Analysis for U.S. Term Limits at 7 (explaining that the vendor acted
17 without the committee's authorization and the committee took prompt remedial action).
18 Similarly, in MUR 5580 (Alaska Dem. Party) the Commission found reason to believe, but took
19 no further action other than to admonish the committee based on sworn declarations from a
20 committee representative and a vendor representative that the original mailing included the

29044251054

1 required disclaimer, but that it was inadvertently deleted during production.² See MUR 5580,
2 First General Counsel's Report dated August 24, 2005 and Certification dated August 30, 2005.

3 In light of the respondents' sworn assertions, the small amount potentially at issue, the
4 possibility of vendor error, and the unlikelihood that listeners would be confused about the
5 source of the call since the candidate identifies himself by name at the beginning of the message,
6 we do not believe it would be an efficient use of the Commission's resources to pursue this
7 matter. Accordingly, the Commission exercises its prosecutorial discretion and dismisses the
8 allegations against Representative Tom McClintock and McClintock for Congress and David
9 Bauer, in his official capacity as treasurer. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

² MUR 5580 was decided prior to the Commission's issuance of a *Statement of Policy Regarding Commission Action in Matters at the Initial Stages in the Enforcement Process*, 72 Fed. Reg. 12545 (March 16, 2007), that clarified that dismissal is appropriate when the evidence is sufficient to support a reason to believe finding, but the circumstances do not warrant the additional use of the Commission's resources.